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THE MOVEMENT TOWARD THE NATURAL LAW JURISPRUDENCE

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In the January-February 1953 issue of the *Ateneo Law Journal* we wrote an article on the nature of the natural law according to the sound Scholastic tradition of St. Thomas. It is the purpose of this article to show that that tradition, which suffered an almost total eclipse outside the Catholic world of thought in the last half of the 19th century and well into the 20th century, is experiencing once more in the world of jurisprudence what Rommen calls an 'eternal return', *'die ewige wiederkehr des Naturrechts'*.

Writing for the *Notre Dame Lawyer,* the world-renowned American jurist, Roscoe Pound, said: "Something like a resurrection of natural law is going on the world over . . . philosophical jurisprudence which was all but extinct fifty years ago has revived and taken the lead in the present century." [1]

World War II and the mounting ideological tensions of the last ten years have served to strengthen this view. Modern man is becoming more strongly convinced that if law is to safeguard human freedom and foster world peace, it must be founded not on force but on reason; that it must derive its validity not from the sheer will of the majority or from the so-called absolute sovereignty of the State, but from the fact that it embodies in a practical

[1] Roscoe Pound, "The Revival of the Natural Law, 17 *Notre Dame Lawyer* 287 (1942).

structure the essential order of ends and means inscribed and discoverable in normal human nature. Juridical positivism has been weighed and found wanting.

It was not pure coincidence that the first half of the twentieth century should at once be the heyday of juridical positivism and the bloodiest epoch in human history. We have witnessed in our generation the destruction of the freedom, not merely of minorities but of whole nations; the cold-blooded 'liquidation,' not of individuals alone but of an entire race; the ruthless fury of two World Wars in which the bombing of civilians and the obliteration of cities were considered legitimate forms of warfare. "What a record," says Justice Jackson, "for an age governed more than any other by men of our (the legal) profession." [2] And he gives the reason why juridical positivism by its inner logic encouraged international lawlessness and aggression:

> At the opening of this tortured and bloody century, law-trained men dominated the councils of most Western nations. They were thinking about problems of State in relation to certain assumptions supplied by their legal discipline. Four of these, at the risk of over-simplification, may be thus condensed: First, each State is sovereign, its right absolute, its will unrestrained, and free to resort to war at any time, for any purpose. Second, courts, therefore, must everywhere regard any war as legal, and engagement in warfare must be accepted as a good defense to what otherwise would be crime. Third, measures by high officials such as planning, instigating and waging war constitute 'acts of State', in performance of which they owe no legal duty to international society and for which there is no accountability to international law. Fourth, for obedience to superior orders an individual incurs no personal liability.[3]

These four assumptions could, perhaps, be summed up in one: the complete divorce of the juridical order from the moral order. Despite diverging philosophical postulates, all forms of juridical positivism agree on one basic point: that law is independent from morality. Law, according to the positivists, is no more than the will of the majority or the command of the sovereign. Whatever the sovereign commands and has the power to enforce is law.

[2] Justice Jackson, "Legal Answer to international lawlessness", 35 *American Bar Association Journal* 813 (Oct., 1949).
[3] *Ibid.*, p. 813.

Sir Hartley Shawcross, then Attorney General of Great Britain, was expressing the pure doctrine of positivism when he stated in 1946: "Parliament is sovereign; it may make any laws. It could ordain that all blue-eyed babies shall be destroyed at birth." [4] Scarcely less picturesque and positivistic is Justice Holmes' language in *Buck* v. *Bell:* "It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes. Three generations of imbeciles are enough." [5]

The same ruthless logic is found in Hitler's reason for the cold-blooded liquidation of Ernst Rohm and his associates without trial or process of any kind. Their summary execution, Hitler said, was "an act of self-defense of the State." For "in that hour, I was responsible for the fate of the German nation and thereby the Supreme Law Lord of the German people." [6]

One constant note runs through these statements of positivist jurisprudence, namely, that the sovereign needs no justification other than his will, no sanction other than naked force, for any law that he may enact or any action that he may take. The will of the sovereign is law. Transposed to the international sphere and pushed to its ultimate logic, this was the principle which the Nazis and the Soviets used in order to justify the international crimes they perpetrated, such as the violation of treaties, the liquidation of unwanted minorities, the deportation of entire populations to labor camps, and so forth.

We have at last learned our lesson. The extinction of freedom under the totalitarian State and the horrible crimes committed in the name of absolute sovereignty have taught us that when law is divorced from ethics, it ceases to be a guarantee of freedom and becomes an instrument of tyranny in the hands of the State. If law is merely the enforceable command of the sovereign, then we can say that the Nazi government in Germany and in the occu-

[4] Quoted by Richard O'Sullivan, *Under God and the Law*, p. xxiv, n. 1, Westminster, Md., The Newman Press, 1949.
[5] 274 U. S. 200.
[6] Loewenstein, "Law in the Third Reich," 45 *Yale Law Journal*, 779-797.

pied countries was legally established. For as Jacoby puts it: "The subjection, not only of the country but of the people, was accomplished, step by step, by way of law and decree. If, as Carl Schmitt explains, 'legal' means what is formally correct, everything that was done to the Czech people was quite legal." [7]

The realization of the futility of the juridical order when cut off from its ethical moorings gave impetus to the modern revival of natural law jurisprudence. To be sure, not everyone who uses the term 'natural law' or some similar term means the same identical thing by it. Stammler speaks of an *a priori* form of law and of justice,[8] Krabbe, of the *Rechtsgefuhl* or sense of right of the community,[9] Charmont, of a natural law which "reconciles itself with the idea of evolution, with the idea of utility," [10] Pound, of the "jural postulates of the age." [11] Whatever technical term they use, these jurists and many others of our day do not exactly mean by it the natural law of Scholastic philosophy. More often than not, they would mean a "natural law with a changing content," to use Stammler's well-known formula. Be this as it may, it is nonetheless significant that modern jurists are beginning to realize that juridical positivism with its utter disregard of the ideal or moral content of the law is totally inadequate to carry out the very purpose of the law, which is to secure freedom and justice for all.

In vain would juridical positivism hedge behind Jellinek's theory of 'auto-limitation.' For auto-limitation on the part of the State is pure illusion. If the sovereign state can validly claim that its will is *ipso facto* law, that it does not have to derive its binding force from the moral order, that it is bound by law only because it consents to be bound and insofar as it consents to be bound by it, then what is there to prevent the State from withdrawing that consent, if and when this should serve its purpose? It is

[7] Jacoby, *Racial State,* New York, Institute of Jewish Affairs, 1944, p. 5.
[8] Stammler, *Theory of Justice* (Trans. Isaac Husiz), in Modern Legal Philosophy Series, Vol. VIII, Boston, 1925.
[9] Krabbe, *The modern idea of the state* (Trans. Sabine and Shepard), New York, 1922.
[10] Charmont, *La renaissance du droit natural* (Partially translated) in Modern Legal Philosophy Series, Vol. VII, Boston, 1916.
[11] Pound, *An introduction to the Philosophy of Law.* New Haven, Yale University Press, 1922.

clear then that the juridical order, when unmoored from the ethical, cannot remain a guarantee of human freedom. It becomes a mere arbitrary creation of the human will, which may or may not recognize the inalienable rights of the human person.

It is no wonder that even Duguit, who claims to be a thoroughgoing positivist, takes recourse to what he calls *droit objectif,* an "objective law" which lies beyond the realm of State action, and which is based purely on the facts of social solidarity:

> We believe firmly, says Duguit, that there is a rule of law above the individual and the State, above the rulers and the ruled; a rule which is compulsory on one and on the other; and we hold that if there is such a thing as sovereignty of the State, it is juridically limited by this rule of law.[12]

Likewise, the well-known English political thinker, Mr. Laski, asserts:

> I have rights which are inherent in me as a member of society; and I judge the State, as the fundamental instrument of society, by the manner in which it seeks to secure for me the substance of these rights . . . Rights, in this sense, are the groundwork of the State. They are the quality which gives to the exercise of its power a moral penumbra. And they are natural rights in the sense that they are necessary to the good life.[13]

It is a fact then that among modern jurists the conviction is growing that law must be measured by some ideal standard of justice, independent from the will or whim of the sovereign. It matters not whether that ideal standard is called "social conscience" or "objective law" or "jural postulate" or an "a priori form of justice." What really matters is, in Justice Cardozo's words, "that the judge is under a duty, within the limits of his power of innovation, to maintain a relation between law and morals, between the precepts of jurisprudence and those of reason and good conscience." [14]

[12] Duguit, *Traité de droit constitutionel,* Vol. I, 2nd. ed. (5 vols.), Paris, 1921-26, p. 11.
[13] Harold Laski, *A grammar of politics,* New Haven, Yale University Press, 1930, p. 39.
[14] Benjamin N. Cardozo, *Nature of the judicial process in Selected Writ-*

This task of maintaining a relation between law and morals is one which confronts a judge in his everyday work at court. For there are always 'gaps' in the law. The law is by necessity couched in general terms. It issues broad rules to cover the common run of cases. It cannot by its very nature provide for every change and contingency in life. As St. Thomas says: "A principle of direction should be applicable to many . . . For if there were as many rules or measures as there are things measured or ruled, they would cease to be of use, since their use consists in being applicable to many. Hence law would be of no use, if it did not extend further than to one single act." [15] It is therefore the task of the judge (whom St. Thomas calls *"justitia animata,"* living justice) to give living flexibility to the law, so that it will adapt itself to unforeseen cases and changing conditions according to the spirit of justice embodied in the law. Otherwise, nothing will be left but "the letter that killeth," and *summum jus* will become *summa injuria.*

This is all the more necessary in those branches of the law where there are few rules, and judicial decisions have to rely mainly on standards and degrees. Hence, despite the legal positivists who want to "wash with cynical acid" every moral concept engrained in the law, such time-honored phrases persists in common law jurisprudence, as "fair conduct" in the case of a fiduciary, "due care" in the law of negligence, "good faith" and "fair competition" in business transactions, "due process of law" in the bill of rights.[16] By their very persistence in Anglo-American law, these concepts, which embody not legal rules but moral standards, are in themselves a proof of the indispensability of natural law principles in the sound administration of the positive law.

It is these natural law principles of justice, fairness, good faith, that must bridge the gaps in the law, temper its ruthless logic, and give rational direction to its growth. To quote Justice Cardozo once more:

ings of B. N. Cardozo (ed. Margaret E. Hall), New York, Fallon Law Book Co., 1947, p. 162.

[15] St. Thomas, *Summa Theologica*, I-II, q. 96, a. 2 ad 2.

[16] *V.* Charles Grove Haines, *The revival of natural law concepts*, Cambridge, Harvard University Press, 1930, p. 318.

> The system of law-making by judicial decisions . . .would be indeed intolerable in its hardship and oppression if natural law, in the sense in which I have used the term, did not supply the main rule of judgment to the judge when precedent and custom fail or are displaced . . . When the law has left the situation uncovered by any pre-existing rule, there is nothing to do except to have some impartial arbiter declare what fair and reasonable men, mindful of the habits of life of the community, and of the standards of justice and fair dealing prevalent among them, ought in such circumstances to do, with no rules except those of custom and conscience to regulate their conduct.[17]

To be consistent with its fundamental tenet, positivism would have to hold that there really are no gaps in the law, that the so-called 'unprovided-for-cases' are really provided for, since in such cases when there are no definite rules of law, the judge is presumed to act as a delegate of the sovereign, and his decisions are commands of the sovereign.[18] But this is tantamount to destroying the positivist notion of law, as the sheer will of the sovereign. For when a judge renders a decision in unprovided-for-cases, he does not look to the will of the sovereign, which by hypothesis is nowhere ascertainable; he looks rather to the fundamental standards of justice or fair play or reasonable conduct. Such, at least, is the judicial practice under the Common Law system, a system which is largely the living product of judge-made law.

Another positivist solution to the problem of the 'gaps' in the law would be to say that in the absence of an explicit rule of law, the judge is simply to dismiss the case and refuse judgment one way or the other. But this would in most cases amount to denying justice, and driving people to self-help methods of redress. As a matter of fact, modern codes in continental Europe make it the duty of a judge to render judgment even when there is no known rule of law applicable to the case. The French Civil Code provides that "the judge who refuses to render judgment on the pretext of the silence, the obscurity or the inadequacy of the law, could be prosecuted as guilty of a denial

[17] Cardozo, *op. cit.*, p. 168.

[18] Lon L. Fuller, *The law in quest of itself*, Chicago, The Foundation Press, Inc., 1940, p. 39.

of justice."[19] Likewise, the Swiss Civil Code provides, as follows:

> The statutes govern all matters within the letter or the spirit of any of its mandates. In default of any applicable statute, the judge is to pronounce judgment according to customary law, and in default of a custom, according to the rules which he would establish if he were to assume the part of a legislator. He is to draw his inspiration, however, from the solutions consecrated by the doctrine of the learned and the jurisprudence of the courts.[20]

Nowhere is the inadequacy of legal positivism more evident than in the field of international relations. It is a positivist dogma that the State is endowed with absolute, undivided sovereignty. Hence it cannot be bound by any law which is not of its own making, that is to say, by any law of conduct which it has not previously consented to abide by. Obviously, this does away completely with those general principles and specific rules of conduct which the long experience of nations has more or less gathered into a body of customary international law. But this dogma does away no less with the binding force of treaties even freely entered into by sovereign nations. For why should formal treaties have the binding force of law at all? Because of the consent of the contracting parties? Because of the principle of *pacta sunt servanda?* But why should this principle bind the will of a sovereign State? If the validity of treaties is based solely on consent, what will prevent a State from withdrawing its consent at a convenient time, and treating treaties as mere 'scraps of paper?"

Time was, perhaps, when this 'consent theory' might have passed as a practical explanation of the binding force of international law. In fact, the Permanent Court of International Justice once favored this theory. "International law," the Court declared, "governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as

[19] Art. 4 of the French Civil Code, quoted in Haines, *The revival of natural law,* p. 323, n. 2.

[20] Art. 1 of the Swiss Civil Code *v.* Haines, *op. cit.,* p. 324, n. 1.

expressing principles of law . . ."[21] The sad experience of two World Wars in which treaties and agreements were tossed aside by many nations as mere 'scraps of paper,' has made many jurists revise their old notions of absolute sovereignty.

As long as the world was still compartmented by geographical barriers into so many more or less isolated economic and cultural units, legal positivism could go on believing that the 'theory of consent' or that of 'autolimitation' was all that was needed to explain the validity of international law. Under those conditions nations could still afford to ignore one another, or deal with one another on the basis of some sort of 'gentlemen's agreement.' Today the nations of the world can no longer afford to ignore one another. The tremendous technical inventions of our scientific age in the field of mass communication on the one hand, and in the field of mass destruction on the other, have made most of mankind conscious of the need of some kind of world organization to work for peace and to preserve the world from the horrors of an atomic warfare.

It was inevitable, then, that today, as once before in the war-torn times of Grotius, legal minds should again turn to the natural law (by whatever name they may call it) in search of valid ultimate principles upon which to build the structure of municipal and international law. "The time has come," as Fenwick says, "when the search for a separate basis for international law, as distinct from that of municipal law, is not only illogical but socially harmful." He continues:

> Law within the individual state is not a mere accident of historical development; it is an essential element of human association. Man, as Aristotle put it, is by his very nature a social being; and he is by his very nature in need of law. *Ubi societas, ibi jus.* In like manner, under the conditions of modern times, the state notwithstanding its corporate character, has become itself 'a social being' in relation to other members of the international community. The time was when philosophers might properly describe the state as 'the perfect society,' the society within whose circle man might fulfil

[21] *V.* Charles G. Fenwick, *International law,* New York, Appleton-Century-Crofts, 1948, p. 30, n. 11.

> all his needs. That time is now past. The interdependence of states is a fact; a community of interests between the states exists in as real a sense as a community of interest between individual men. The need of law between state and state is as great . . . as the need of law between man and man.[22]

These views which are gradually gaining wider acceptance among present day writers on international law are by no means a new discovery. With a keener political insight, Suarez had already expressed them three centuries ago in his treaties *De Legibus*:

> The rational basis . . . consists in the fact that the human race, into howsoever many different peoples and kingdoms it may be divided, always preserves a certain unity (as it were) enjoined by the natural precept of mutual love and mercy; a precept which applies . . . even to strangers of every nation. Therefore, although a given sovereign State . . . may constitute a perfect community in itself, consisting of its own members, nevertheless, each one of these states is also, in a certain sense, and viewed in relation to the human race, a member of that universal society; for these states when standing alone are never so self-sufficient that they do not require some mutual assistance, association, and intercourse . . . Consequently, such communities have need of some system of law . . . and although that guidance is in large measure provided by natural reason, it is not provided in sufficient measure and in a direct manner with respect to all matters; therefore, it was possible for certain special rules of law to be introduced through the practice of these same notions . . . just as in one state law is introduced by custom . . .[23]

It took the horrible experience of two World Wars, however, to revive these views in the minds of world leaders and legal scholars. We first had to witness the open cynicism with which Nazi Germany and Soviet Russia violated international treaties and conventions, to learn anew that international law is built on shifting sand, when it is built upon the theory of force, or of 'consent,' or of 'auto-limitation,' on the part of absolute sovereign States, and not upon the natural law principle expressed in the maxim: *ubi societas, ibi jus.*

[22] *Ibid.*, p. 21.

[23] Francisco Suarez, *Selections from three works: De legibus, defensio fidei, de tripl[illegible] tute* (trans. Gwladys L. Williams et al.), Oxford, Clarendon Press, 1944.

There is an international law because there is an international community. As that community does not arise from the purely optional consent of individual States, but rather from the natural basic need of peoples to associate with one another for their mutual assistance and for the promotion of friendship and justice among nations, so too the law which must govern international relations in that community does not derive its binding force from the purely optional consent of individual States, but from the very nature of man, as a social and political being, in a word, from the natural law. What Burke said of civil society and the natural duties arising therefrom, may be said with equal truth of the international community and of international relations:

> Now, though civil society might be at first a voluntary act (which in many cases it undoubtedly was), its continuance is under a permanent standing covenant, coexisting with the society; and it attaches upon every individual of that society, without any formal act of its own. This is warranted by the general practice, arising out of the general sense of mankind. Men without their choice derive benefits from that association; without their choice they are subjected to duties in consequence of those benefits; and without their choice they enter into a virtual obligation as binding as any that is actual. Look through the whole of life and the whole system of duties. Much the strongest moral obligations are such as were never the result of our option. I allow that if no supreme ruler exists, wise to form, and potent to enforce, the moral law, there is no sanction to any contract, virtual or even actual, against the will of prevalent power.[24]

The need of a natural law foundation for the structure of the international order was painfully realized by many a jurist in connection with the Nuremberg Trial of the Nazi war criminals. It was clearly seen how orthodox juridical positivism with its keystone principle of absolute sovereignty could not logically supply the legal basis for bringing the Nazi leaders to trial.[25] It was, in fact,

[24] Edmund Burke, in *Burke's politics* (ed. Hoffman and Levack), New York, Alfred A. Knopf, 1949.

[25] In referring to the Nuremberg trial, it is not our intention either to justify or to condemn, without cautious qualifications, the law which governed the procedure and the decision in the case. We merely wish to point out the existence of undeniable 'gaps' in the law, which, as the whole reasoning of the Chief Prosecutor, Justice Jackson, shows, only a jurisprudence unafraid

upon this very principle of absolute State sovereignty, and upon its corollary principle that the State is the sole source of law, that the Nazis rested their whole defense.

They did not deny the facts nor the evidence. They admitted frankly that the acts they were accused of were *moral* crimes of the first magnitude. But their defense was that they acted in obedience to the State, which has the sovereign right to command any acts necessary for the successful prosecution of the war. They contended that however wrong, *morally,* their acts were, they were not *legally* wrong or punishable, because at the time of their commission there was no positive international law that made them punishable. *Nullum crimen sine lege* summed up their whole defense. As Dr. Otto Stahmer said on behalf of all the Nazi defendants: "A real order among the States is impossible as long as every State has the sovereign right to wage war at any time and for any purpose."[26] Dr. Jahreis, counsel for General Jodl, even more pointedly asserted: "In a State in which the entire power to make final decisions is concentrated in the hands of a single individual, the orders of this one man are absolutely binding on the members of the hierarchy. This individual is their sovereign, their *legibus solutus* . . . (they) have neither the right nor the duty to examine the orders of the monocrat to determine their legality."[27]

Granted the fundamental assumptions of positivism, this defense is logically unassailable. Justice Jackson, who was the Chief Prosecutor at the Nuremberg Trial, admitted as much:

> If no moral principle is entitled to application as law until it is first embodied in a text and promulgated as a command by some superior effective authority, then it must be admitted that the world was without such a text at the time the acts I have recited took place. No sovereign legislative act to which the Germans must bow have defined international crimes, fixed penalties and set up courts to adjudge them. From the premise that nothing is law if not embraced in a sovereign command, it is easy to argue that the Nuremberg trial applied retro-active, or *ex post facto* law. European lawyers generally and particularly those of the German School, think of the command as making the law, and of the law as only the command. And with the increasing reliance of all society upon the legislative process there is a growing tendency of common law peoples to think of law in terms of specific sovereign enactment.[28]

of the dynamic absolutes of the natural law can in theory or practice fill, after the manner of the Common Law. The law of the Nuremberg decision, itself, is controversial. Granting, in virtue of Germany's unconditional surrender, the jurisdiction of the International Military Tribunal created by the London Agreement of August 8, 1945, the question remains by what legal right did the Court exercise *punitive* justice for 'Crimes against Peace' which were not *legal* crimes either under German municipal law or under international law, the Paris Pact notwithstanding. *Cf.* Hans Leonhart, "The Nuremberg Trial: A legal analysis," 11 *The Review of Politics,* 449.

[26] As quoted by Whitney Harris, "The Nuremberg Trial," *Journal of the State Bar of California,* XXII (March-April), 929.

[27] *Ibid.*

Justice Jackson then shows the fallacy of the idea that law is found only in specific sovereign enactment. Under the common law system, he says, crimes were punishable long before there were legislatures. Criminal statutes are a comparatively recent creation, tracing their genealogy directly to the judicial decisions of earlier days. Confronted with an evil deed, the early English judge dealt with it directly unaided by statute as reasonably and justly as he could. "He applied what has sometimes been called a natural law that binds each man from acts so inherently wrong and injurious to others that he must know they will be treated as criminal. Unless international law is deprived of this common law method of birth and growth, and confined wholly to progression by authoritarian command, then the judges at Nuremberg were fully warranted in reaching a judicial judgment of criminal guilt.[29]

Although there is a half-disguised reluctance on Justice Jackson's part (as indeed on the part of many Anglo-Saxon jurists), to use the consecrated term "natural law"—a term and concept which such common law lawyers of the past, as Bracton, Coke, Blackstone, Marshall and Wilson used without misgivings—the logic and tenor of his article clearly show that in his opinion international law, like the common law, can be built soundly only on the foundation of the moral principles of justice, which are the universal heritage of mankind—in a word, on the natural law.

Unequivocal and forthright declarations on this issue are not entirely lacking. John Foster Dulles, now Secre-

[28] Justice Jackson, *op. cit.,* p. 885.

[29] Justice Jackson, *ibid.,* p. 884 ff.

tary of State of the U. S. A., in his address to the assembly of the World Council of Churches held in Amsterdam in 1948, stated forcefully that international law can bring peace to the world only if it is founded on two great principles:

> One is recognition that there is a moral law and that it provides the only sanction for man-made laws. The other principle is that the human individual, as such, has dignity and worth that no man-made law, no human power, can rightly desecrate . . . Belief in a moral law flows from the assumption that there is a divinely ordained purpose in history, that moral considerations are ultimate, and that man, through his laws, cannot disregard the moral laws with impunity, just as he cannot disregard the physical laws of the universe without wrecking himself. Belief in the dignity and worth of the individual flows from the assumption that the individual is created by God in His image and likeness, is the object of God's redemptive love and is directly accountable to God. He therefore has a dignity and worth different than if he were only a part of the material order. Men, born to be children of God, have rights and responsibilities that other men cannot take from them.[30]

From all the foregoing statements, it is sufficiently evident, I think, that the "resurrection of the Natural Law" of which Pound speaks is gradually becoming an actual fact. If more proof is needed, one could point to the work done by the United Nations Organization for the codification, recognition, and legal protection, of fundamental human rights.

Without using the term "natural law" even once, yet clearly directing their efforts toward the formulation of its basic content, 49 out of the 58 United Nations at the Paris General Assembly of December, 1948, solemnly agreed on a *Declaration of Human Rights,* which set forth those rights and freedoms conceived to be the inherent rights and fundamental freedoms of man. Not a single nation opposed the Declaration, and although the Soviet Union and its satellite countries abstained from voting, even they were quite ready to grant such human rights and freedoms, provided it was definitely understood that they were enjoyed only "in accordance with the laws of one's country." In other words, provided that those rights

[30] John Foster Dulles, "Moral law and international law," 34 *American Bar Association Journal,* 1125.

and freedoms were recognized as flowing from the government. But such was not the mind of the vast majority of the United Nations there assembled. They "reaffirmed their faith in fundamental human rights, in the dignity and worth of the human person;" they declared that "all human beings are born free and equal in dignity and rights;" that "they are endowed with reason and conscience and should act towards one another in a spirit of brotherhood;" that "everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, color, sex, language, religion . . . (nor) on the basis of the political, jurisdictional, or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovercignty." [31] These rights, in other words, belong to man "from the simple fact that man is man, nothing else being taken into account," to use Maritain's phrase.[32]

It is true that the Universal Declaration of Human Rights does not as yet have the force of law, and that the covenant or treaty which is meant to transform it into a legal instrument of international justice may never be ratified by the majority of the United Nations. But what is significant for our purpose is the fact that practically all the nations on earth have formally subscribed to the view that the human person has an inherent worth and dignity, that he has certain rights and freedoms which are not derived from the State nor from any association of States, but from human nature as such. This is not yet a perfect statement of the natural law doctrine, but it is not far from one—it almost reproduces the immortal paragraph of the American Declaration of Independence: "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed."

[31] *V.* Universal Declaration of Human Rights, arts. I, II, and the preamble. The complete text is found in *Great Expressions of human rights,* New York, Harper and Bros., 1950.

[32] Maritain, *The rights of man and the natural law,* p. 63, New York, Charles Scribner's Sons, 1949.

Natural Law Trend in the United States.

In the United States, in particular, though the fundamental legal philosophy prevailing in the legal world is still one brand or another of pragmatism, the movement towards the revival of the natural law jurisprudence is steadily gathering momentum. It has not escaped the attention or interest of the *American Bar Association Journal* which, besides carrying provocative articles *pro* and *con* on the natural law, is not in the least embarrassed to editorialize as follows:

> . . . today the critical problems and confusions which our great transition is forcing upon us compel us again to turn to natural law for eternal values and ideas of universal application . . . It seems high time, therefore, that we re-examine (its) basic concepts . . . From observations in the laboratory and observatory the universe has grown increasingly mysterious. God is not excluded. And the nuclear scientists are leaders in the effort to master sufficient moral force to control the atomic energy which they have released . . . We should listen to the counsel of F. S. C. Northrop that 'no problem in society, science or life is fully understood until its grounds in the metaphysical nature of things are discovered.' [33]

The time was when one could say that the natural law was an almost extinct concept in the legal world outside the Catholic Scholastic circles. Today that is no longer true. Not a few well-known American jurists in non-Catholic universities are definitely veering towards something like a natural law jurisprudence:

> Three American jurists in particular are at present working out an approach to a recognizably idealistic position in legal philosophy. They are Lon C. Fuller of Harvard, Jerome Hall of Indiana and Edmond N. Cahn of New York University. While stressing at all times the social nature of all legal phenomena, these men have nevertheless opposed the pragmatic philosophical position in two main respects. They attack its pluralism as leading to cultural determinism and skepticism and they attack its alleged amoralism. For them the ideal content in law needs conscious elaboration in order that competing ideals may be examined and evaluated and the fundamental purposes of law given unified direction; that value judgments themselves may be put on a rational basis so that the gap between morality and law be closed.[34]

[33] 35 *American Bar Association Journal* 42 (Jan., 1949). See also 34 ABAJ 1120 (Dec., 1948); 35 ABAJ 12; 37 ABAJ 35.

The natural law revival is given a strong impetus by the Natural Law Institute held annually (the first one was in 1948) at Notre Dame University, whose example in this regard was followed in 1950 by Loyola University of Los Angeles. Other universities and law schools in the country, it is hoped, will follow suit and hold natural law institutes of their own, where outstanding members of the Bench and Bar would be invited to participate and rediscover for themselves the perennial values of natural law jurisprudence and the sound, dynamic direction it can give to the legal and political institutions of our age. With scholars of the stature of Roscoe Pound, Edward S. Corwin, Richard O'Sullivan and others, taking part in these institutes, and challenging the validity of juridical positivism and denouncing the totalitarian implications of Justice Holmes' philosophy, and avowing, as Corwin does, that "as the matrix of American Constitutional Law, the documentary Constitution is still, in important measure, Natural Law under the skin" [35] — we have indeed some reason to believe that "something like a resurrection of the natural law" is going on in the United States and the world over.

(*To be continued*)

[34] Thomas A. Cowan, "American philosophy of law," 50 *Columbia Law Review* 1096 (Dec., 1950). *Cf. My philosophy of law: credos of sixteen American scholars,* Boston, Boston Law Book Co., 1941.

[35] Edward S. Corwin, "The natural law and constitutional law," in *Natural Law Institute,* Vol. II, Notre Dame, 1949, p. 47.